

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLY MICHAEL MARCET,

Defendant-Appellant.

UNPUBLISHED

August 6, 2002

No. 222400

Bay County Circuit Court

LC No. 98-001439-FH

Before: Bandstra, P.J., and Hoekstra and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manslaughter, MCL 750.321, operating a motor vehicle under the influence of intoxicating liquor causing death, MCL 257.625(4)(a), operating a motor vehicle under the influence of intoxicating liquor causing serious bodily impairment, MCL 257.625(5)(a), and felonious driving, MCL 752.191. He was sentenced to concurrent prison terms of ten to fifteen years for the manslaughter and OUIL causing death convictions, forty to sixty months for the OUIL causing serious injury conviction, and sixteen to twenty-four months for the felonious driving conviction. Defendant appeals as of right. We affirm.

This case arises from a traffic accident that began with the driver of a car swerving to avoid a recklessly driven pickup truck, and ended with a multiple-car collision in which the driver of the car was killed and a passenger was severely injured. Several eyewitnesses testified at trial, variously describing the offending truck and driver. At a police lineup conducted one month after the accident, some witnesses identified defendant as the man driving the truck, while others hedged between defendant and another person in the lineup or identified someone other than defendant altogether.

Defendant raises a number of issues on appeal. We will consider each in turn.

I. In-Court Identifications

Defendant first argues that the trial court erred in allowing identification evidence of both himself and his truck. We disagree. The decision whether to admit evidence is within the trial court’s discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

A. Identification of Defendant

Of the several eyewitnesses who testified concerning the extent of defendant's similarity in appearance to the person they saw driving the truck on the occasion at issue, defense counsel objected with respect to only two, both of whom admitted they had identified someone other than defendant at the lineup, but stated at trial that defendant looked similar to the driver they saw at the time in question. Defendant argues that these one-on-one confrontations at trial were impermissibly suggestive, requiring suppression of the witnesses' testimony. We disagree.¹

Generally, where a witness fails to provide positive identification at a pretrial lineup, but then professes to identify the defendant positively upon seeing that defendant in court, the latter identification should not be used at trial. See *People v Solomon (Amended Opinion)*, 220 Mich App 527, 531; 560 NW2d 651 (1996), and *People v Winans*, 187 Mich App 294, 296-300 (McDonald, J.), 301 (Reilly, J., concurring); 466 NW2d 731 (1991). Here, however, we note that the witnesses did not positively identify defendant as the guilty party, and that defense counsel cross-examined those witnesses concerning their earlier identification of persons other than defendant in the lineup. Accordingly, we conclude that the trial court did not abuse its discretion in allowing the challenged testimony.

B. Identification of the Truck

Defendant next argues that the trial court erred in refusing to suppress the witnesses' identifications of defendant's truck, a purple Chevrolet pickup, as resembling the offending vehicle. Defendant contends, as he did below, that because the prosecutor had shown some witnesses a picture of defendant's truck and no other during the investigation, the pretrial identification procedure was impermissibly suggestive and that therefore, any in-court identification of defendant's truck was inadmissible at trial. Again, we disagree.

Defendant argues as if the strictures attendant to identification of suspects apply equally to identification of instrumentalities of a crime. However, as this Court has observed, "[t]he risks inherent in a misidentification of inanimate objects produced in the thousands are not the same as the risks of misidentification of unique human beings." *People v Miller (After Remand)*, 211 Mich App 30, 41; 535 NW2d 518 (1995). Thus, "any suggestiveness in the identification of inanimate objects is relevant to the weight, not the admissibility, of the evidence." *Id.* Accordingly, we conclude that the trial court correctly allowed the identification evidence, the challenges relating to pretrial suggestiveness of inanimate objects being a matter of weight, as tested through cross-examination and closing argument, not admissibility. There was no abuse of discretion in this instance.

¹ Although defendant also suggests that these witnesses' identifications were tainted by unduly suggestive pretrial identification procedures, he nowhere argues that the lineup itself was impermissibly suggestive, or that any other identification procedure took place before trial. Thus, we limit our review to considering whether the confrontation at trial was unduly suggestive.

II. Bad-Acts Evidence

Defendant characterizes as improper bad-acts evidence the testimony of defendant's friend, Brian Bleicher, to the effect that defendant had invited him to accompany defendant on a drive to Saginaw to purchase cocaine shortly after the accident took place. Defendant argues both that this was substantively improper pursuant to MRE 404(b)(1), and procedurally improper pursuant to MRE 404(b)(2).

Defendant concedes that there was no substantive or procedural objection to this evidence placed on the record below. Because there was no objection placed on the record, our review of this issue is limited to ascertaining whether plain error occurred that deprived defendant of his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We conclude that no such error occurred here.

The absence of any objection, or discussion of MRE 404(b) below, suggests that neither party thought the rule applicable in this instance, and rightly so. That rule concerns bad acts offered to prove behavior in conformance with them, and defendant was not charged with any cocaine-related crime in this prosecution. Because MRE 404(b) is inapplicable for that threshold reason, the prosecutor had no obligation to give notice of his intent to elicit the challenged testimony, MRE 404(b)(2), or to qualify the evidence pursuant to the rule's other provisions, MRE 404(b)(1). Had the prosecutor elicited more than a passing mention of the cocaine connection, there might have been a question of relevance, MRE 401, or unfair prejudice, MRE 403, but the brief mention in this instance only served to give the jury a more complete understanding of all the facts attendant to defendant's actions in the moments after the accident occurred. Indeed, the limitations on evidence of uncharged bad acts must be balanced against the imperative that "prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Accordingly, we find no error in the admission of the challenged testimony and, as a result, reject defendant's further assertion that the prosecutor acted improperly in eliciting such testimony, and that counsel was, therefore, ineffective in failing to raise an objection to its admission at trial. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

In any event, even assuming the testimony to have been improperly admitted, any prejudice to defendant was minimal. The prosecutor did not belabor the cocaine connection and there was no suggestion that defendant was under its, as opposed to alcohol's, influence at the time in question. Moreover, as defendant points out, the defense in this case was mistaken identity, and defendant's use of cocaine bore not at all on the question whether defendant, as opposed to someone else, was the driver of the truck that caused the fatal accident. Finally, the trial court specifically instructed the jury to consider the evidence only insofar as it "tend[ed] to show why Brian Bleicher went to Saginaw with the defendant," and admonished the jury that it "must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes."

III. Hearsay Rebuttal Evidence

Defendant next asserts that the trial court abused its discretion in allowing the prosecutor to introduce hearsay evidence during improper rebuttal of a defense witness. We disagree.

Defense counsel elicited on direct examination of Robert Edsall that he was at Bleicher's house when defendant and Bleicher arrived home after their trip to Saginaw on the day of the accident. Edsall testified on direct that defendant "had a buzz on," but was not consuming alcohol at the time and was not "hammered," but in fact seemed fit to drive. Defense counsel further elicited from Edsall that the next day he teased defendant about news reports concerning a blond-haired man with a purple truck causing a serious accident, and that defendant denied that he was the guilty party.

When asked on cross-examination if on the evening in question defendant had stated that he had been drinking all day at a bar, Edsall answered in the negative. Edsall similarly denied that defendant had confessed to driving around at ninety miles per hour and almost hitting somebody after crossing over the centerline into oncoming traffic.

The prosecutor called Mark Nichols for rebuttal, and elicited from him that Edsall had told him that defendant had spoken to him regarding the accident. Defense counsel objected to this testimony on hearsay grounds, to which the trial court responded by allowing the evidence after admonishing the jury to use it strictly to assist in its credibility determinations concerning Edsall. There was no defense objection on the ground that this was impermissible rebuttal. Nichols went on to report that Edsall told him that defendant "said he was ridin' down 13 and crossed the center line, was goin' about 90 miles an hour," and that Edsall told him that defendant said that he had been drinking all day at a bar.

A. Hearsay

Defendant argues that the rebuttal testimony at issue was "second hand hearsay," which was inadmissible in the prosecution's case-in-chief, but cynically brought in as impeachment.

Hearsay, meaning testimony as to another person's unsworn, out-of-court assertions, offered to prove the truth of the matter asserted, is presumptively inadmissible, subject to several exceptions and exemptions provided by the rules of evidence. See MRE 801 and 802.

"Hearsay included within hearsay is not excluded . . . if each part of the combined statements conforms with an exception to the hearsay rule . . ." MRE 805. In this case, the two links in the asserted hearsay chain are defendant's alleged statements to Edsall, and Edsall's alleged statements to Nichols. The former is exempted from the definition of hearsay as an admission by a party opponent. MRE 801(d)(2)(A). The latter is exempted from the definition of hearsay as the declarant's prior statement inconsistent with the declarant's testimony at trial. MRE 801(d)(1)(A). Thus, the challenged testimony was not hearsay at all, and the trial court acknowledged this by instructing the jury to consider it only as it bore on Edsall's credibility.

B. Rebuttal

To preserve an evidentiary issue for appellate review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). Because there was no improper-rebuttal argument raised at trial, our review is limited to ascertaining whether there was plain error affecting substantial rights. *Carines, supra* at 774.

Although “a party may introduce extrinsic evidence to contradict an adversary’s answers on cross-examination regarding matters germane to the trial,” he generally “may not introduce extrinsic evidence to contradict a witness regarding collateral, irrelevant, or immaterial matters.” *People v Lester*, 232 Mich App 262, 275; 591 NW2d 267 (1998), citing *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995). Similarly, “[a] prosecutor cannot elicit a denial during the cross-examination of a defense witness and use such denial to inject a new issue into the case.” *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991).

In this case, what defendant may have confessed to Edsall about his driving and recollections on the day in question bore on a matter germane to the trial, not on something collateral, irrelevant, or immaterial. *Lester, supra*. Moreover, inquiry into the possibility that defendant offered admissions tending to implicate himself in the charged conduct was not injecting a new issue into this case. *Leo, supra*. For these reasons, admission of the challenged rebuttal testimony was not plain error.²

IV. Prosecutorial Misconduct

Defendant next argues that the prosecutor engaged in improper argument by asserting facts not in evidence, suggesting that defendant was obliged to prove his innocence, and denigrating a defense witness. We disagree.

Defendant draws the first two of his three allegations of misconduct from the prosecutor’s argument that, although several of the witnesses had identified others in the lineup, none of those other individuals had spent the entire day of the accident drinking, owned a purple truck, or told their friends that they could not remember what happened that day.

Although defendant objected to this argument on the ground that the prosecutor was arguing facts not in evidence, which the trial court sustained, there was no objection to the effect that the prosecutor was shifting the burden of proof. Preserved issues of prosecutorial misconduct are reviewed by this Court through evaluation of the prosecutor’s comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). However, this Court’s review of unpreserved claims of prosecutorial misconduct is limited to ascertaining whether the prosecutor engaged in misconduct so egregious that no curative instruction would have counteracted the prejudice to defendant, or whether manifest injustice otherwise resulted from the conduct in question. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

In this case, the challenged argument was offered for the obvious purpose of reminding the jury that the lineup identification of defendant was not the only evidence linking defendant to the crime. Indeed, because various eyewitnesses expressed uncertainty over whether defendant was the person they saw driving the offending truck, and those who viewed the lineup varied in

² In reaching this conclusion, we reject defendant’s contention that the risk of unfair prejudice from this rebuttal evidence substantially outweighed its probative value. As noted above, the trial court took pains to limit the jury’s consideration of the evidence in question to its credibility determinations concerning Edsall. Accordingly, the risk of prejudice was slight.

their impressions concerning which person most resembled the offender, the prosecutor was obliged to downplay the significance of that evidence and emphasize the evidence that more clearly suggested that defendant was the culprit. A prosecutor need not confine argument to the “‘blandest of all possible terms.’” *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). Under these circumstances, it would have been a most illogical leap for any juror to suppose that any other person in the lineup was genuinely suspected in the crime, or that whether those others had been drinking or driving on the day and times in question had any bearing on the case. It should have been obvious to the jury that the prosecutor was only emphasizing that evidence other than the varying lineup results supported the prosecution’s theory of the case. Accordingly, we find no error in the prosecutor’s argument.

Concerning the alleged shifting of the burden of proof, we note that the trial court instructed the jury that the prosecutor bore the burden of proof. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, any prejudice that may have remained despite this instruction, could have been cured by additional instruction prompted by a timely and specific objection. *Launsbury, supra*. For these reasons, we reject the unpreserved claim of error attendant to the allegation that the prosecutor attempted to shift the burden of proof.

Defendant’s final allegation of misconduct stems from the prosecutor’s having admonished the jury during closing argument to “take [defendant’s mother’s exculpatory] testimony with a grain of salt.” The prosecutor continued, “I would say that about . . . any mother testifying in a case where her son’s on trial. She has a tremendous . . . stake in the outcome of this case.” Defendant argues that this was improper denigration of a witness. Defendant concedes, however, that defense counsel did not raise this issue below, leaving this issue unpreserved. We find no basis upon which to conclude that this was improper argument at all, see *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987), let alone misconduct so egregious that no instruction could have cured any prejudice, or that manifest injustice resulted. *Launsbury, supra*.

V. Sufficiency of the Evidence

Defendant next challenges the sufficiency of the evidence concerning his identity as the driver of the truck involved in the accident. When reviewing the sufficiency of evidence in a criminal case, we must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Defendant asserts that none of the eyewitnesses positively identified him or his truck, and that, therefore, the evidence linking him to the crime was insufficient to support the convictions. However, defendant presents no authority for the proposition that positive eyewitness identification of a perpetrator or instrumentality is required. To the contrary, eyewitness identification is but one means of connecting a suspect with a crime. See *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972) (even where the witnesses’ identification of the defendant is less than positive, the question remains one for the jury). The elements of a crime may be proved entirely without eyewitness or other direct evidence. See CJI2d 4.3(2) (“Facts can . . . be proved by indirect, or circumstantial evidence.”).

In arguing this issue, defendant does not acknowledge, let alone attempt to refute, evidence other than eyewitness identification that tended to link him to the crime. This includes the testimony of one eyewitness whose identification of defendant's truck as the offending vehicle was qualified only to the extent that the witness was concerned that two different pickup trucks might have the same color and dent, along with evidence that defendant had been drinking all day, had driven very recklessly just after the accident occurred, and the day after the accident had expressed concerns about the accident while admitting that he did not remember his own doings during the time of the accident. Accordingly, we conclude that defendant has failed to present a basis upon which we might conclude as a matter of law that the evidence was insufficient to support defendant's convictions.

VI. Sentencing

Defendant next raises several issues concerning his sentencing. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In this case, the recommended minimum sentence range for manslaughter under the sentencing guidelines,³ as scored by the trial court, was four to ten years. The sentences actually imposed matched the recommendations of the Department of Corrections in the presentence investigation report, the manslaughter sentence coming in at the upward limit of the recommended range under the guidelines.

Defendant challenges his sentences on various grounds. We will consider each in turn.

A. Uncharged Conduct

Defendant argues that the trial court abused its discretion by presuming that he was in fact guilty of second-degree murder, along with other uncharged crimes, when fashioning its sentence. We disagree.

Although a sentencing court may not make an independent finding of guilt of a crime other than that for which the defendant is being sentenced, *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987), it may take into account facts underlying uncharged offenses, pending charges, and acquittals, *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley, J.), 473 (Boyle, J.), 458 NW2d 880 (1990). Defendant's assertion that the trial court presumed him guilty of second-degree murder stems from the court's indication that it likened defendant's degree of recklessness pursuant to the charged conduct to the intent to cause death or serious injury. We agree with the trial court's conclusion that the evidence indicated that "defendant's actions of driving the wrong way on I-75 on a Sunday evening in late summer created a very high risk of death or great bodily harm," and that defendant "knew or should have known that

³ Because the conduct for which defendant was convicted occurred before January 1, 1999, the judicial guidelines promulgated by the Michigan Supreme Court apply, as opposed to the legislative guidelines enacted pursuant to MCL 769.34.

death or great bodily harm was a probable result.” The trial court was not obliged to disregard that evidence or avoid that conclusion simply because of an overlap with the elements of second-degree murder.

Defendant also complains generally that the trial court “recited a litany of other offenses that it concluded Defendant was guilty of.” Defendant, however, neither challenged any of these factual conclusions at the sentencing proceeding, nor targets any of these findings on appeal as lacking evidentiary support. Defendant thus fails to provide this Court with any reason to question any of these findings. “A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” *People v Mackle*, 241 Mich App 583, 604, n 4; 617 NW2d 339 (2000).

For these reasons we reject defendant’s assertion that the trial court improperly applied a presumption of defendant’s guilt in connection with uncharged crimes.

B. Scoring of Offense Variable 3

Defendant next argues that offense variable 3 was improperly scored to reflect that he committed second-degree murder instead of manslaughter, and suggests that the score for that variable should have been ten or zero. However, because defendant does not dispute the accuracy of the facts on which the trial court relied to score the offense variable, we need not consider defendant’s challenge. See *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997) (a challenge “to the judge’s calculation of the sentencing variable on the basis of his discretionary interpretation of unchallenged facts . . . does not state a cognizable claim for relief.”). In any event, the trial court explained that it was scoring that variable at twenty-five because “both death and great bodily harm resulted from defendant’s driving, which created the very high risk of death and great bodily harm, with knowledge that death or great bodily harm was a probable result.” As discussed above, the trial court’s conclusion in this regard was well supported by the evidence.

C. Established Sentencing Factors and Standards

Citing the various factors and considerations that should guide a sentencing court’s discretion, defendant next complains that the trial court failed to explain itself sufficiently to support its decision. We disagree.

Although a sentencing court should articulate the reasons behind a particular sentence sufficiently to allow the defendant to understand the reasoning involved, see *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992), as with all situations where the trial court is obliged to explain its resolution of disputed issues, “[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” MCR 2.517(A)(2). In imposing criminal sentences, if the court indicates that the guidelines have been brought into play, the court need not provide further explanation. *Lawson, supra*. Here, the trial court precisely followed the recommendations in the presentence investigation report for each conviction, and repeatedly referred to the PSIR and the guidelines at sentencing. The court expressly recognized the guidelines’ minimum sentence range for manslaughter, and ultimately sentenced defendant within that range. We are thus satisfied that the trial court adequately explained the basis for its sentencing decisions.

D. Deviation from the Guidelines and Proportionality

Relying on his arguments concerning the scoring and application of the guidelines, defendant asserts that the trial court's sentencing decision constitutes an upward departure from proper recommendations under the guidelines. Because we reject defendant's premise above, we reject his conclusion here. The trial court did not in fact deviate from the guidelines.

Defendant's argument that the sentence imposed was disproportionate stands on a similarly infirm foundation. Sentences within the guidelines are presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant offers no argument sufficiently compelling to indicate that it was an abuse of discretion for the trial court to sentence defendant at the high end of the range under the guidelines. We agree with the trial court that in light of the tragic results that followed from defendant's wanton lack of concern for the great likelihood that his behavior would result in death or great bodily harm to others, imposing the maximum allowable sentences on defendant was appropriate.

We affirm.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell